

REMARKS

The present Amendment is in response to a Non-Final Office Action mailed November 16, 2007. A Petition for a Three-Month Extension of Time thereby extending the time for responding to the Office Action from February 16, 2008 to and including May 16, 2008 is submitted herewith.

Claims 1-20 were rejected in the Action. No claims have been amended herein. Claim 9 has been canceled and claim 22 has been added herein. Therefore, claims 1-8, 10-20 and 22 are currently pending in the present application. No new matter has been added. Applicants set forth remarks relating to the Action below.

In the Action, the Examiner objected to the drawings and also rejected claim 9 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention. The Examiner asserted that the flat perimeter surface of one of the baseplates being longer than the flat surface of the angled distal end must be shown or the features canceled from the claims. In order to expedite prosecution of the present case, Applicants have canceled claim 9 herein rendering the objection to the drawings and the rejection of this claim moot. Applicants reserve the right to claim the subject matter of canceled claim 9 in one or more divisional applications.

Further in the Action, the Examiner rejected claims 1-20 under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,478,800 to Fraser et al. ("Fraser") in view of U.S. Patent No. 5,401,269 to Buttner-Janz et al. ("Buttner-Janz") and PCT Appln. No. WO 01/62191 to McGahan et al. ("McGahan"). The Examiner asserted that *Fraser*, in FIG. 4, shows an implant with upper and lower baseplates having perimeters. The Examiner

further asserted that *Fraser* shows, in FIG. 12, a tool with a corresponding distal surface 106 and a plurality of spacers or projections protruding outwardly from the distal surface to thus form a recessed engaging surface. The Examiner relied upon *Buttner-Janz* to supplement the lack of disclosure in *Fraser* of an articulatable spinal implant and *McGahan* to supplement the lack of disclosure in *Fraser* of a spinal implant with angled perimeter flat.

Independent claim 1 is unobvious over *Fraser* in view of *Buttner-Janz* and *McGahan* because there is no reason to combine these references in the manner the Examiner asserted. The Examiner refers to a plurality of spacers or projections shown on pusher block 18 in FIG. 12 of *Fraser*. What the Examiner refers to as spacers or projections are located on the outside perimeter of distal surface 106 of pusher block 18 and therefore cannot lordodically angle a first baseplate with respect to a second baseplate in the manner claimed in independent claim 1.

Independent claim 1 of the present Application recites "the manipulation tool further including a spacer protruding outwardly from the angled distal surface, the spacer having an upper surface and a lower surface, wherein the first baseplate is lordodically angled with respect to the second baseplate as the lower surface of the first baseplate is held against the upper surface of the spacer." The spacers or projections that the Examiner refers to in *Fraser* are not and could not be used to keep a first baseplate lordodically angled with respect to a second baseplate as a lower surface of the first baseplate is held against an upper surface of the spacer. Since all the Examiner uses *Buttner-Janz* for is to teach an articulatable implant having first and second baseplates, the implant having a slot on the outer surface capable of receiving a tool, and

McGahan to teach the spinal implant 10 with angled perimeter surfaces having a central flat surface 22 flanked by two flat corner perimeter surfaces 18, 26 that correspond to the angle distal end of the tool having central surface 128 and two flat flanked surfaces 126, 130 to engage the implant, neither of these references cures this deficiency of *Fraser*.

Further, the manipulation tool in *McGahan* is not used to engage an implant having first and second baseplates mounted to one another such that the first and second baseplates are articulatable relative to one another. In contrast, the manipulation tool in *McGahan* is used to engage and/or manipulate a non-articulatable implant. The Examiner is utilizing the manipulation tool of *McGahan* to teach the inclusion of angled surfaces on the distal end of the manipulation tool of *Fraser*, which is also a manipulation tool used to engage and/or manipulate a non-articulatable implant. For the foregoing reasons, independent claim 1 is unobvious over *Fraser* in view of *Buttner-Janz* and *McGahan* and should be allowed. Simply put, one of ordinary skill in the art would not have combined those references to arrive at the present invention. Claims 2-20 are unobvious and should also be in condition for allowance, *inter alia*, from their dependence from claim 1. A dependent claim is necessarily narrower than the claim from which it depends.

New independent claim 22 is also unobvious over *Fraser* in view of *Buttner-Janz* and *McGahan*. In this new claim, the angled distal surface of the manipulation tool that corresponds to the angled perimeter of the first and second baseplates of the present invention is structured to prevent rotation of the baseplates with respect to the manipulation tool along a first rotational axis. The spacer protruding outwardly from the angled distal surface of the manipulation tool when engaged to the first and second baseplates is structured to prevent

rotation of the baseplates with respect to the manipulation tool during insertion along a second rotational axis perpendicular to the first rotational axis. The claimed engagement of the manipulation tool with the baseplates of the present invention along a first and second rotational axis is therefore similarly unobvious over *Fraser* in view of *Buttner-Janz* and *McGahan*. As stated above, *Fraser* and *McGahan* only teach non-articulatable implants and there would be no reason to combine *Buttner-Janz* with the tools of *Fraser* and *McGahan* to prevent rotation of the implant in *Buttner-Janz* along the two claimed axes. There is also no suggestion in *Buttner-Janz* that a first baseplate is lordodically angled with respect to the second baseplate at any time during insertion thereof. Therefore, independent claim 22 should also be in condition for allowance.

In light of all of the above, Applicants respectfully request allowance of each of the currently pending claims. As it is believed that all of the rejections set forth in the Official Action have been fully met, favorable reconsideration and allowance are earnestly solicited.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: May 16, 2008

Respectfully submitted,

By


William A. Di Bianca

Registration No.: 58,653
LERNER, DAVID, LITTENBERG,
KRUHMOLZ & MENTLIK, LLP
600 South Avenue West
Westfield, New Jersey 07090
(908) 654-5000
Attorney for Applicants